87-1265

No.

Supreme Court, U.S.
FILED
JAN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

MISHA UMANSKY, a/k/a MICHAEL UMANSKY and MISHA OF SIBERIA FURS, INC.,

Petitioners,

vs.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a Delaware Corporation, and VISA INTERNATIONAL SERVICE ASSOCIATION, a Delaware Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN F.X. FENERTY
BARATTA & FENERTY
Attorneys for Petitioners
7510 Brous Avenue
Philadelphia, Pennsylvania 19152
(215) 338-4600

6718
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a default judgment of $510,815 may be entered against two of eighteen tortfeasors, all of whom are allegedly jointly and severally liable, when the liability and extent of liability of five of the eighteen tortfeasors has not yet been established.

2. Where a subsequent civil action asserts joint and several liability against numerous defendants, did prior restitution orders of various amounts rendered in criminal proceeding against one of the defendants constitute a meritorious defense to default judgments for much larger amounts rendered in the subsequent civil action based on the same transactions.

3. Did the petitioners present meritorious defenses to a default judgment by showing that the district court awarded $113,649.22 for an undocumented claim of costs, disbursements and attorney fees and $53,950.19 in interest from February, 1985 through November 10, 1986, although the court had earlier orally awarded interest only from November 10, 1986 to January 5, 1987?

4. At a non-evidentiary hearing on a Rule 60(b) motion to vacate a default, is it not a violation of due process for the court to rely on the plaintiffs' attorney's affidavit and oral argument to contest the facts stated in the defaulting defendant's affidavit concerning the defendant's mistake, inadvertence and excusable neglect in failing to appear and answer the complaint.

5. Where the court does not hold an evidentiary hearing on a Rule 60(b)(1) motion, but only hears oral argument in support of petitioners' affidavit, was the requirement of "mistake, inadvertence, surprise or excusable neglect," established by petitioners' affidavit and improperly contested by respondents' counsel proffer of his affidavit and assertions of hearsay and opinion.

OTHER DEFENDANTS WITH NO INTEREST IN THESE PROCEEDINGS

The following is a list of the other defendants who have no interest in the appeal below or in this petition:

Askari Jewelers, Inc.
Kourash Hatan Abadifarahni Askari
Marat Balagula
Linda Chipman (a/k/a Linda Gonzales)
Robert Fasano
Andrew Feldman
Jeffrey Mertzel
Thomas Morin
Benjamin Nayfeld (a/k/a Ben)
Otis Rogers
Alan Vaisburg
Richard Vallejo
Another Time Antiques, Inc.
The Estate of Ilya Zeltzer
Eugene Zinshtein
Gene's Jewelers, Inc.

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No.

In The

Supreme Court of the United States

October Term, 1987

MISHA UMANSKY, a/k/a MICHAEL UMANSKY and MISHA OF SIBERIA FURS, INC.,

Petitioners,

vs.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a Delaware Corporation, and VISA INTERNATIONAL SERVICE ASSOCIATION, a Delaware Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

None of the opinions delivered in the courts below appear in any reporter.

Review is requested of the order of the United States Court

of Appeals for the Second Circuit dated and entered on September 14, 1987. On October 23, 1987 the petition for rehearing with a suggestion for rehearing en banc was denied.

STATEMENT OF JURISDICTION

Jurisdiction is based on 28 U.S.C. § 1254(1).

CONSTITUTONAL PROVISIONS AND RULES INVOLVED

1. The Fifth Amendment to the United States Constitution:

ARTICLE V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; now shall private property be taken for public use, without just compensation.

2. Federal Rules of Civil Procedure, Rule 60(b)(1) and (6):

> *Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.*
>
> On Motion and upon such terms as are just, the Court may relieve a party or a party's legal

> representative from a final judgment, order, or proceeding for the following reasons; (1) mistake, inadvertence, surprise, or excusable neglect . . . (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

This is a federal civil action against thirteen individual defendants and five corporations alleging violations of RICO, the New York business law, fraud, and unjust enrichment, seeking damages and injunctive relief. As its Exhibit A the complaint attached a thirty-four (34) count federal indictment naming twelve of the thirteen individual civil defendants each of whom was convicted for some but not all of the same transactions asserted in the civil action. It was agreed in both the civil and criminal actions, the petitioner Michael Umansky was involved in fur transactions of $15,364.70. He was sentenced to pay a total restitution obligation, joint and severally, for $135,815. In the subsequent civil action, however, a default judgment for joint and several liability of $510,140.37 was entered against the petitioners and seven of the thirteen individual defendants for all of the transactions asserted in the complaint and the indictment. The respondents requested and were granted dismissals against three individual defendants and the estate of one defendant: one they could not find, two were settling by agreeing to pay certain amounts, and the estate was dismissed since it lacked assets. The respondents' claims against another defendant were severed at the request of his counsel who appeared and intended to defend against the claim.

The petitioners timely filed a Rule 60(b) motion to vacate the default judgment. Misha Umansky's affidavit explained his mistake, inadvertence, and excusable neglect based on his very poor English, his not knowing of the case or of being served and

the confusion and similarity between his criminal case and the civil case. His counsel argued that the meritorious defenses to the $510,140.37 arose from the same transactions giving rise earlier to a final order in federal court which had decided that his joint and several liability was only $135,815, and that the petitioners were not liable for any of the damages, attorney fees, costs, disbursements or interest which were included in the $510,140.37. The lower court concluded that Mr. Umansky failed to show a meritorious defense or reasonable excuse for the default and the court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

The Court's power of supervision is required to correct the lower court's departure from the accepted and usual course of judicial proceedings and the lower courts' decisions are in conflict with the decision of another federal court of appeals on the same matter.

I.

The petitioners' meritorious defenses to the damage award were improperly denied.

It was clear error for the lower courts to conclude that this case presented no meritorious defenses to the entry of the default judgment. The error is described in *Frow v. De La Vega,* 82 U.S. (15 Wall) 552, 21 L. Ed. 60 (1872); *H.B. Hunt v. Inter-Globe Energy,* 770 F.2d 145 (10th Cir. 1985) and *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc.,* 722 F.2d 1319 (7th Cir. 1983).

The Court in *Frow v. De La Vega, supra,* called granting a default judgment against less than all of the joint and several defendants "unseemly and absurd, as well as unauthorized by law." at 554.

In this case it was improper to hold a damages hearing before the liability of each defendant had been resolved. At the damages hearing of January 5, 1987, the court granted Mr. Balagula's counsel's request and severed for a separate trial the claim against Balagula, a major defendant according to the indictment and complaint. This severance, consented to by the defendants, destroyed the joint and several nature of the claim with the respondents' implied consent.

The respondents requested and were granted dismissals of their claims against four of the other defendants: two of whom were agreeing to pay certain limited amounts, another one who could not be found, and a fourth whose estate was without assets.

In the Seventh Circuit the rule of *Dundee Cement Company, supra,* at 1324, the court explained that:

> Although this Court's decision in *In Re: Uranium Antitrust Litigation,* 617 F.2d 1248 (7th Cir. 1980), made clear that where liability is joint and several, the entry of default judgment against fewer than all Defendants in an action is proper, we further held that a damages hearing may not be held until the liability of each Defendant has been resolved. The policy underlying that decision was the avoidance of inconsistent damage awards on a single claim involving joint and several liability. As stated in *Uranium,* "just as the several or independent nature of Plaintiff's claim permits different findings as to liability of individual Defendants, the joint nature of Plaintiff's claim prohibits different findings as to damages against all Defendants." 617 F.2d at 1262.

See also, Moore's Federal Practice Section 55.06 (2nd Ed. 1983).

See also, Moore's Federal Practice Section 5506 (2nd Ed. 1983).

Furthermore, in *Hunt v. Inter-Globe Energy, Inc.*, 770 F.2d 145 at 147 (1985) the Court of Appeals for the Tenth Circuit followed *Frow, supra,* when it concluded that "[w]hen multiple Defendants are alleged to be jointly liable and fewer than all Defendants default, the district court may not render a liability determination as to the defaulting parties unless and until the remaining Defendants are found liable on the merits." Mr. Balagula's liability in the civil case was severed from the defaulting defendants, therefore it was reversible error for the district court to determine damages as to the defaulting parties without first determining the liability of Mr. Balagula.

The Tenth Circuit in *Hunt, supra,* at 148, went on to say:

> [W]hether or not *Frow* is controlling, we agree with the Seventh Circuit that just as consistent verdict determinations are essential among joint tortfeasors, consistent damage awards on the same claim are essential among joint and several tortfeasors (citing *Dundee Cement Co. v. Howard Pipe and Concrete Products, Inc).* Otherwise, Plaintiffs armed with joint and several liability on a single claim could seek to execute on a larger damage award from a party against whom the Court awarded a much smaller damage verdict - the situation that occurred here.

It was error not to hold an evidentiary hearing on the liability of all defendants before deciding that amount of damages due. "[W]e have held that a court may enter a default judgment without a hearing only if the amount claimed is a liquidated sum or one capable of mathematical calculation." *Id.* The attorney fees and interest calculations on the damage award are both unclear and unsubstantiated.

The absurdity of granting this default judgment against less then all of the alleged joint and severally liable defendants was demonstrated by the prior criminal restitution order of $135,815 against Misha Umansky for joint and several liability on the same transactions as involved in this civil case which involved a totally inconsistent order for $342,540.96. The additional award of $113,649.22 for undocumented attorney fees, costs or disbursements violates due process, the American Rule concerning attorney fees and essential fairness. *David v. Musler,* 713 F.2d 907, 917 (2nd Cir. 1983). The award of $53,950.19 in interest violates the lower court's January 5, 1987 order which allowed interest but only from November 10, 1986, not ending November 10, 1986, as the January 12, 1987 order states.

II.

The petitioner's affidavit demonstrated a reasonable excuse for the default which respondents' counsel improperly contested.

F.R.C.P. Rule 60(b) provides for a court to vacate a judgment where a party satisfies one of six grounds including:

> (1) mistake, inadvertence, surprise or excusable neglect; . . . and . . . (6) any other reasons justifying relief from the operation of the judgment.

Mr. Umansky filed an affidavit in support of his claim that he failed to answer the complaint due to his poor English, his not being served, his not knowing that papers allegedly put in his hands by a stranger during the break in his criminal sentencing were a TRO motion in the subsequent civil action, and his being reasonably confused between the two cases which concerned the same matters. He stated that he took immediate action once he

learned that a default had been entered, all of which was proof of his excusable neglect.

The respondents' New York counsel orchestrated and silently watched his server give the TRO papers discreetly to Mr. Umansky in the federal court hallway in Philadelphia and deliberately chose not to alert Mr. Umansky's criminal defense counsel during the short break in sentencing. Respondents' counsel filed an affidavit and aggressively argued hearsay and disparaging opposition to Mr. Umansky's affidavit at the Rule 60(b) argument. The lower courts relied on the respondents' counsel and concluded that petitioners failed to show a reasonable excuse for the default. The lower courts have allowed the respondents' counsel to become both the respondents' advocate and fact witness without any cross examination or any evidentiary hearing on counsel's assertions.

CONCLUSION

The petitioners' Rule 60(b) motion was improperly denied in violation of the petitioners' due process rights and in conflict with the fair application of a default judgment involving joint and several liability for multiple defendants.

Respectfully submitted,

JOHN F.X. FENERTY
BARATTA & FENERTY
Attorneys for Petitioners

APPENDIX A—JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 14, 1987 AFFIRMING JUDGMENT OF THE SOUTHERN DISTRICT OF NEW YORK DENYING MOTION TO VACATE THE DEFAULT JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of September, one thousand nine hundred and eighty-seven.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE LAWRENCE W. PIERCE,

HONORABLE FRANK X. ALTIMARI,
Circuit Judges.

87-7223

MERRILL. LYNCH, PIERCE, FENNER and SMITH, INCORPORATED, et al.,

Plaintiffs-Appellees,

-against-

ASKARI JEWELERS INC., et al.,

Defendants,

Appendix A

-and-

MISHA UMANSKY, etc.,

Defendants-Appellants.

Appeal from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, and decreed that the judgment of said district court is AFFIRMED.

1. The district court denied appellants' motion to vacate a default judgment in a civil RICO action against appellants based upon the court's determination that there is no meritorious defense and that appellants offered no reasonable excuse for the default. We see no reason to disturb this determination.

s/ Wilfred Feinberg
WILFRED FEINBERG,
Chief Judge

s/ Lawrence W. Pierce
LAWRENCE W. PIERCE,

s/ Frank X. Altimari,
FRANK X. ALTIMARI,
Circuit Judges

Appendix A

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B—ORDER DENYING PETITION FOR REHEARING OF OCTOBER 23, 1987 OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 23rd day of October one thousand nine hundred and eighty-seven

Docket No. 87-7223

MERRILL LYNCH, PIERCE, FENNER and SMITH, INCORPORATED, a Delaware Corporation, and VISA INTERNATIONAL SERVICE ASSOCIATION, a Delaware Corporation,

Plaintiff-Appellees,

-v-

ASKARI JEWLERS, INC., KOUROSH HATAN ABADIFARAHANI ASKARI, LINDA CHIPMAN (a/k/a LINDA CHIPMAN GONZALEZ), ROBERT FASANO, ANDREW FELDMAN, BENJAMIN NAYFELD (a/k/a BEN) MISHA UMANSKY (a/k/a MICHAEL UMANSKY), MISHA OF SIBERIA FURS, INS., ALAN VAISBERG, EUGENE ZINSHTEIN and GENE'S JEWELERS, INC.,

Defendants,

MISHA UMANSKY and MISHA OF SIBERIA FURS, INC.,

Defendants-Appellants.

Appendix B

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants MISHA UMANSKY and MISHA OF SIBERIA FURS, INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX C—TRANSCRIPT OF LOWER COURT DENYING MOTION TO VACATE DEFAULT JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ. 8587

MERRILL LYNCH, PIERCE, FENNER, SMITH, et al.,

Plaintiffs,

-v-

ASKARI JEWELERS, INC., et al.,

Defendants.

February 17, 1986
9:30 A.M.

Before:

HON. CHARLES L. BRIEANT,
Chief District Judge

APPEARANCES:

J. RUSSELL CLUNE
Attorneys for Plaintiffs
JUSTINE TOBIA,
of counsel

Appendix C

KORNSTEIN, VEISZ & WEXLER
Attorneys for Defendants
Umansky, and Misha Of Siberia
DANIEL KORNSTEIN,
of counsel

REGEN REPORTING SERVICE, INC.
2450 Linette Court
Yorktown Heights, New York 10598
(914) 736-1509

[2] THE COURT: Good morning.

MR. KORNSTEIN: Good morning, your Honor. My name is Dan Kornstein, for the defendant Misha Umansky and Siberia Furs, Inc.

This is my motion to vacate a default judgment that apparently was set by the court. I found out about it on February 4th. On February 6th I had my papers in court to vacate it. Essentially, I want to get back in the ballgame. The judgment is several hundred thousand dollars. The client is in Pennsylvania. And on February 24th I understand he is about to start a four year term of imprisonment.

Even people who are sentenced to time are entitled to have a day in court. In the civil court case that may arise —

THE COURT: They have to answer promptly or give some reasonable explanation of why they didn't. And it has to also have some showing that he has a meritorious defense.

Appendix C

MR. KORNSTEIN: On both counts we feel we meet the criteria. He is a Russian immigrant. Even at his criminal case there was an interpreter for it.

THE COURT: Stealing is bad in Russia too. [3] My understanding was he was already sentenced to restitution for a hundred thirty-five thousand dollars dollars. Isn't that correct?

MR. KORNSTEIN: I believe that is correct.

THE COURT: How much is the judgment against him here?

MR. KORNSTEIN: I believe it is over three hundred thousand dollars. We think that the restitution aspect on the criminal matter has some bearing on the civil penalty.

THE COURT: This is not a penalty. This is a case for money not received as a result of a fraud. Your client was the merchant on a white plastic case?

MR. KORNSTEIN: That is my understanding, your Honor.

THE COURT: You can continue.

MR. KORNSTEIN: We have circumstances that are at least unusual. With the serving of the Summons and Complaint my information is different from the information supplied by Mr. Tobia.

My information is he was served with a Summons and Complaint on the day of the sentence hearing. I was not there. I don't know what actually happened. But the affidavit submitted by [4] the defendant is that during some confusion or a recess

he got some papers. He didn't know what they were, didn't speak to his criminal counsel and I did not hear anything about a later service of the Summons and Complaint.

Once again as soon as the lawyers in Philadelphia became aware of it they contacted me. We moved quite expeditiously overnight, on the merits.

The Complaint is a long, prolix document. There are several claims. It is complex. Simply the fact that he was convicted in the federal criminal proceedings does not resolve all questions in civil proceedings. First as to the amount of damages, and secondly as to whether there is a perfect overlap on the elements of the causes of action being that the fellow is going to be incarcerated, we don't have to worry.

THE COURT: Has he paid the restitution?

MR. KORNSTEIN: My understanding is not as yet.

THE COURT: You are here. Therefore, he is not a dead beat.

MR. KORNSTEIN: That is my understanding. That's right.

[5] THE COURT: He has enough money to pay a lawyer?

MR. KORNSTEIN: I have not received any yet.

THE COURT: If you're representing a convicted felon who is actually in the can, you have a problem.

MR. KORNSTEIN: That is my problem and I'll deal with that. But my understanding is he does have assets.

Appendix C

THE COURT: I would think he does and maybe Mr. Tobia will get himself organized and collect the restitution.

MR. TOSIA: Well your Honor, the restitution order of the court is an enforceable and executable judgment. That was the purpose. Mr. Umansky does have assets. At the time we—

THE COURT: —Was the restitution a condition of probation on the other count?

MR. TOSIA: Yes, it was your Honor.

THE COURT: Did you ever hear of a violation of probation?

MR. TOSIA: He is not placed on probation until after he finishes serving his prison sentence of four years. There is something that [6] goes deeper than that. Mr. Umansky claims that his defense in this matter is he doesn't understand the English language. I was present at his sentencing and submitted an affidavit to the effect that Mr. Umansky was a successful businessman.

THE COURT: His language is only good in the store?

MR. KORNSTEIN: Yes.

THE COURT: We have thousands of Americans here on drug cases and they all need interpreters because when they get into the courthouse they lose their language skills.

MR. KORNSTEIN: When the judge was telling him of his constitutional rights there were times when Mr. Umansky answered the court in English directly. And his claims are totally spurious. He was served with a T. R. O. because the Marshall's office will

not serve a Summons and Complaint. The papers we submitted here, indicate that the defendant's conduct was totally contumacious of the court's proceedings.

His actions were willful, as part of an overall conspiracy. If it wasn't for merchants like Mr. Umansky this type of fraud could not [7] continue. I don't think the court should be placed in the position of making itself a collection agency between the thieves your Honor and decide who is going to pay what. Merrill Lynch was out and we had a hearing on the issues with respect to damages with respect to all defendants and I think the level of prejudice that the plaintiff's will continue to suffer if Mr. Umansky is left free to dispose of assets while he is getting ready to go to prison on the 24th of this month, leaves us with no other relief other than what we're trying to seek here which is to lift the stays, allow us to execute that. That is what caused your Honor to move. When Mr. Umansky saw the light and finally decided to retain counsel in this matter, I spoke to him personally on the telephone. He had know difficulty.

THE COURT: You talked to him?

MR. KORNSTEIN: Yes, I did.

THE COURT: How could you talk to him when he had an attorney.

MR. KORNSTEIN: On November the 8th, he was — we were noticed. We're required because of the order to show cause and the temporary restraining order to attempt to notify potential [8] defendants of the intentions of the plaintiff and that was the purpose of my conversation with Mr. Umansky, not with his attorney.

Appendix C

His attorney Mr. McTier represented him in the criminal proceeding. This was a civil proceeding and I spoke to Mr. Umansky on the telephone, at one of his two places of business. He told me he was going to have his attorney Mr. McTier contact me. I gave him my name and telephone number and I never heard from Mr. McTier.

He was served at the hearing. This whole charade your Honor regarding his time of being served with the Summons and Complaint in the courtroom during a recess is just that he was served with the order to show cause and T. R. O. both of which have been resolved.

We have the affidavits of personal service a week after, five days after his sentence on November the 12th. He was served personally at his place of business with a Summons and Complaint.

We served him with a notice of motion by mail. He had plenty of time to respond to all these proceedings before court and he sought not to do that.

[9] THE COURT: I really think that is true. There is no meritorious defense and no reasonable excuse proffered for taking care of his obligations.

For that reason the motion is denied. The stay is vacated and it is so ordered.

THE COURT: The court directs that Mr. Marat Balagula shall appear for his deposition at a date which shall be designated as a business day by his attorney Mr. Zweibon at at 10:00 A.M. on a business day within the next thirty days. If Mr. Balagula is willing to be deposed in New York, he may appear at such

address as is mutually convenient to his attorney and plaintiff's counsel. If he is not willing to come to New York, he may be deposed in an adjoining state or nearby state upon making payment in advance of reasonable traveling costs of plaintiffs attorneys.

The court gives full and fair notice now that if Mr. Balagula does not make himself available for his deposition in New York or a nearby convenient state, and I would include the provision, it has to be an American state. If he does not do so within the next thirty days, the [10] court proposes to strike his answer out and for failure to give discovery and note his default and take an inquest and do whatever else is needed.

Can we have a date by which you will all come back and give us your status report. March 23rd, at 9:00 A.M.

MR. KORNSTEIN: Thank you, your Honor.

* * * * *

I Lisa Regen, certify this to be a true and accurate transcript of the within proceedings.

Lisa Regen Hearing Reporter

APPENDIX D—DEFAULT JUDGMENT FILED JANUARY 12, 1987 AND PLAINTIFF'S COUNSEL'S ONLY SUPPORT FOR COSTS AND ATTORNEY FEES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 86 Civ. 8587 (CLB)

MERRILL LYNCH, PIERCE, FENNER and SMITH, INCORPORATED, a Delaware Corporation, and VISA INTERNATIONAL SERVICE ASSOCIATION, a Delaware Corporation,

Plaintiffs,

-against-

ASKARI JEWELERS INC.
KOUROSH HATAN ABADIFARAHANI ASKARI
LINDA CHIPMAN (a/k/a LINDA CHIPMAN GONZALEZ)
ROSERT FASANO
ANDREW FELDMAN
BENJAMIN NAYFELD (a/k/a BEN)
MISHA UMANSKY (a/k/a MICHAEL UMANSKY)
MISHA OF SIBERIA FURS, INC.
ALAN VAISBERG
EUGENE ZINSHTEIN, and
GENE'S JEWELERS INC.

Defendants.

ORDER

Plaintiffs have moved this Court to enter a default judgment

and a preliminary injunction restraining defendants from engaging in certain activities and defendants have been served with said motion and have not expressed any opposition thereto.

Upon reading the affidavits of Patrick M. Sweeney and Justin M. Tobia in support of said motion and upon hearing the oral testimony of Patrick M. Sweeney and Robert J. Greene on January 5, 1987, it is hereby

ORDERED that as to the Second, Fifth, Seventh and Tenth Causes of Action the defendants Askari Jewelers Inc., Kourosh Hatan Abadifarhani Askari, Linda Chipman, Robert Fasano, Andrew Feldman, Benjamin Nayfeld, Misha Umansky (a/k/a Michael Umansky); Misha of Siberia Furs, Inc., Alan Vaisberg (a/k/a Alan Burke), Eugene Zinshtein and Gene's Jewelers Inc., and their employees, officers and agents, any business, enterprise or entity related in any way with any such defendants, any person, business, enterprise or entity that receives any Merrill Lynch Bank & Trust Company ("Merrill Lynch") Cash Management Account ("CMA") or VISA International Service Association ("VISA") cardholder information directly or indirectly from any such defendant, and any person or entity acting in concert with any such defendants (hereinafter collectively referred to as "DEFENDANTS") as follows:

(1) DEFENDANTS are enjoined from participating in any manner in or with any business, enterprise, venture, entity or individual that makes or attempts to make sales or to distribute its goods or services and that (a) accepts, deposits or processes charges made to VISA or Merrill Lynch CMA bank cards as payment for the sale, rental, leasing or other distribution of its goods and services, or (b) uses or accepts VISA or Merrill Lynch CMA bank cards in any manner in the conduct of its business,

or (c) uses lists of VISA or Merrill Lynch CMA cardholders in any way;

(2) DEFENDANTS are enjoined from being directly or indirectly employed by or associated with or in consultation with or having an direct or indirect interest in any business, enterprise, venture, entity or individual that makes or attempts to make sales or to distribute its goods and services to customers and that (a) accepts, deposits, or processes charges made to VISA or Merrill Lynch CMA bank cards as payment for the sale, rental, leasing or other distribution of its goods or services, or (b) uses or accepts VISA or Merrill Lynch CMA bank cards in any manner in the conduct of its business, or (c) uses lists of VISA or Merrill Lynch CMA cardholders in any way;

(3) DEFENDANTS are enjoined from having any direct or indirect ownership interest in any business, enterprise, venture, entity or indivdual that (a) accepts, deposits or processes charges made to VISA or Merrill Lynch CMA bank cards as payment for the sale, rental or leasing or other distribution of its goods or services, or (b) uses or accepts VISA or Merrill Lynch CMA bank cards in any manner in the conduct of its business, or (c) uses lists of VISA or Merrill Lynch CMA cardholders in any way;

(4) DEFENDANTS are ordered to divest themselves of any interest they have in any business enterprise, venture, entity or individual that makes or attempts to make sales or to distribute it goods or services and that (a) accepts deposits or processes charges made to VISA or Merrill Lynch CMA bank cards as payment for the sale, rental, leasing or other distribution of its goods or services or (b) uses or accepts deposits or processes VISA or Merrill Lynch CMA bank cards in any manner in the conduct of its business, or (c) uses lists of VISA or Merrill Lynch CMA cardholders in any way;

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(5) DEFENDANTS are ordered to notify VISA and Merrill Lynch within seventy-two (72) hours of becoming directly or indirectly employed by or associated with or in consultation with any business, enterprise, venture, entity or individual that (a) accepts, deposits or processes charges made to VISA or Merrill Lynch CMA bank cards as payments for services or (b) uses or accepts, deposits or processes VISA or Merrill Lynch CMA bank cards in any manner in the conduct of its business, or (c) uses lists of VISA or Merrill Lynch CMA cardholders in any way;

(6) This Order shall be construed broadly to effectuate its purpose of barring DEFENDANTS from doing any fraudulent business with Merrill Lynch or VISA members, affiliates or cardholders in any way involving VISA or Merrill Lynch CMA bank cards and from being involved in any way with any business, enterprise, venture, entity or individual that makes or attempts to make sales or to distribute goods or services and that receives any revenue, pays or offsets obligations, or benefits in any manner from charges made to VISA or Merrill Lynch CMA bank cards or the use of lists of VISA or Merrill Lynch CMA cardholders;

(7) DEFENDANTS are enjoined from destroying any records documents or papers in any way related to alledged unauthorized or fraudulent sales to VISA or Merrill Lynch CMA cardholders, including all personnel records, for a period of seven (7) years from the date of this Order or the creation of the record, whichever is later; and DEFENDANTS are required, at a mutually convenient time upon reasonable notice to defendants' counsel, which need not exceed seventy-two (72) hours to allow plaintiffs or their duly authorized representatives or agents full access to inspect defendants' documents and premises, and in any manner from charges made to VISA or Merrill Lynch CMA bank card (b) to provide plaintiffs or their duly authorized representatives or agents

any reasonable information requested about defendants' business or business practices; and it is further

ORDERED, as to the First, Fourth, Fifth, Sixth, Eighth and Ninth Causes of Action, that defendants Askari Jewelers Inc., Kourosh Hatan Abadifarahani Askari, Marat Balagula, Linda Chipman, Robert Fasano, Andrew Feldman, Benjamin Nayfeld, Misha Umansky (a/k/a Michael Umansky), Misha of Siberia Furs, Inc., Alan Vaisberg (a/k/a Alan Burke), Eugene Zinshtein and Gene's Jewelers, Inc., pay damages, jointly and severally for the injury caused to plaintiffs by knowingly, willfully and intentionally preparing and submitting unauthorized and counterfeit Merrill Lynch CMA VISA bank card drafts for payment and falsely representing that such reflected valid, authorized purchases by Merrill Lynch VISA CMA cardholders when in fact the charges were not valid or authorized, in an amount of Five Hundred Ten Thousand One Hundred Forty Dollars and Thirty-Seven Cents ($510,140.37) to plaintiffs Merrill Lynch, Pierce, Fenner & Smith Incorporated and Visa International Service Association which amount reflects the damages suffered by Plaintiffs of Three Hundred Forty-Two Thousand Five Hundred Forty Dollars and Ninety-Six Cents ($342,540.96) plus interest at a rate of nine (9%) percent per annum measured from February, 1985 through November 10, 1986 of $53,950.19 plus costs and disbursements of $113,649.22.

For the purpose of this Order the term VISA bank card shall include any "access device", "counterfeit access device" and "unauthorized access device" as those terms are defined in 18 U.S.C. §1029(e)(1),(2) and (3) and that are issued by Visa Members. A Visa member is an organization which is a member of Visa International Service Association or Visa U.S.A. Incorporated, which consist of banks, credit unions, and financial

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service associations which issue credit/debit bank cards containing the "VISA" trademarks.

Dated: White Plains, New York
January 12, 1987
Time: 12:35 P.M.

SO ORDERED: 1-12-87.

s/ Charles L. Brieant
Charles L. Brieant
Chief Judge

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 86 Civ. 8587 (CLB)

MERRILL LYNCH, PIERCE, FENNER and SMITH, INCORPORATED, a Delaware Corporation, and VISA INTERNATIONAL SERVICE ASSOCIATION, a Delaware Corporation,

Plaintiffs,

-against-

ASKARI JEWELERS INC.
KOUROSH HATAN ABADIFARAHANI ASKARI
LINDA CHIPMAN (a/k/a LINDA CHIPMAN GONZALEZ)
ROSERT FASANO
ANDREW FELDMAN
BENJAMIN NAYFELD (a/k/a BEN)
MISHA UMANSKY (a/k/a MICHAEL UMANSKY)
MISHA OF SIBERIA FURS, INC.
ALAN VAISBERG
EUGENE ZINSHTEIN, and
GENE'S JEWELERS INC.

Defendants.

STATE OF NEW YORK)
)SS.:
COUNTY OF WESTCHESTER)

JUSTIN M. TOBIA, being duly sworn deposes and says:

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1. I am an attorney-at-law duly admitted to practice law in the Courts of the State of New York and this Court, an associate of the firm of J. RUSSELL CLUNE, P.C., attorney of record for the plaintiffs herein.

2. I make this affidavit in support of plaintiffs' motion for default judgment decided by the Hon. Charles L. Brieant on January 5, 1987.

3. Upon information and belief, the source of said information being my conversations with Patrick M. Sweeney of Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), the costs and disbursements of the action by plaintiff Merrill Lynch total Eighty Three Thousand Twenty Eight Dollars and Thirty-Two Cents ($83,028.32) in expenses.

4. Legal fees and costs incurred by Merrill Lynch and Visa in connection with this matter for the services of J. Russell Clune, P.C. total Thirty Thousand Six Hundred and Twenty Dollars and Ninety Cents ($30,620.90) as of the date of this Order.

Sworn to before me this
9th day of January 1987.

s/ Justin M. Tobia
Justin M. Tobia

s/ Janita Donaldson
Notary Public

APPENDIX E—DISTRICT COURT DOCKET FORM FOLLOWING JANUARY 5, 1987 HEARING

This form shall be returned to the docketing unit, upon completion of a Hearing or Trial, or on the last day of the Calendar Month, when the action is continued to the following month. Should the Hearing or Trial continue for two or more weeks, this form should be submitted on a weekly basis.

BEFORE: Charles L. Brieant
United States District Judge/Magistrate

Docket No. 86 Civ. 8587

MERRILL LYNCH et al.,

Plaintiffs

vs.

ASKARI JEWELERS, KOUROSH ASKARI, LINDA CHIPMAN, ROBERT FASANO, ANDREW FELDMAN, BEN MAYFELD, MISHA UMANSKY, MISHA OF SIBERIA FURS, INC., ALAN VAISBERG, AND EUGENE ZINSHTEIN, GENE'S JEWELERS,

Defendants

INQUEST HELD — Court finds for plt. in the amount of $342,540.96 plus costs and int. at 9% per annum for 11/10/86 until judgment collected against all defts. listed above jointly & severally. Judgment is a 54 B Judgment. Plt. consents to dismissed

case against Otis Rodgers and Ilya Zeltzer. So ordered. Counsel to submit judgment.

* * *

Submitted by J. M. McMahon

Deputy Court Clerk